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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)**

THE PEOPLE,

Plaintiff and Respondent,

v.

SAMMY FOTOFILI,

Defendant and Appellant.

C085319

(Super. Ct. No. 14F07654)

A jury found defendant Sammy Fotofili guilty of robbery (Pen. Code, § 211)¹ and misdemeanor assault (§ 240). Defendant admitted being previously convicted of two serious felonies that also were strike offenses. Thus, pursuant to the “Three Strikes” law, the trial court sentenced defendant to a prison term of 25 years to life, plus 10 years.

¹ Undersigned statutory references are to the Penal Code.

On appeal, defendant contends the trial court abused its discretion in refusing to strike one of his prior convictions. He also contends the trial court erred in finding defendant failed to establish a prima facie case when the prosecutor exercised peremptory challenges based on potential jurors' race. We conclude neither of these claims has merit.

In a supplemental brief, defendant contends he is entitled to benefit from recent changes to the law, which give trial courts discretion to strike five-year felony enhancements imposed under section 667, subdivision (a)(1). The People agree defendant is entitled to benefit from these changes, but argue remand is unwarranted. On this record, defendant has the better argument.

FACTUAL AND PROCEDURAL BACKGROUND²

Underlying Facts and Charges

On November 9, 2014, Nainil Purohit was working as the night manager at the Days Inn Motel in Sacramento. His wife and mother were with him. Purohit's wife was watching the motel surveillance monitors; she saw people trying to steal something from one of the unoccupied motel rooms and alerted Purohit.

As Purohit watched the monitor, Soane Fotofili³ entered a motel room and came out with a television wrapped in a sheet. Defendant, Soane, and a female walked away from the motel with the television as Purohit walked out of the office to confront them. Purohit asked them to return the television and defendant said, "I can take anything I can take from here," then defendant pushed Purohit.

² Additional facts will be included in the discussion as they are relevant.

³ Soane Fotofili is defendant's brother. We will refer to him as Soane to avoid any confusion.

Purohit continued to pursue defendant, Soane, and the female; Soane passed the television to the female and started punching Purohit. Purohit blocked Soane's punches and repeatedly asked them to return the television. At some point during the encounter, Purohit saw defendant push Soane. Eventually, defendant, Soane, and the female got into a car; defendant sat in the driver's seat.

Defendant began to drive away, but first, he drove the car directly at Purohit, coming within a foot of him. Purohit was standing with his wife and mother when they all had to move quickly out of the way to avoid being hit by the car. Purohit called the police and gave them the car's license plate. Within an hour, defendant was arrested and Purohit identified him in a lineup. When law enforcement arrived, Purohit told them defendant pushed him and threw punches at him.

Later that night, Purohit went into the motel room and saw that Soane had ripped the wall mount off the wall when he took the television. When Purohit returned to work the following day, someone had returned the television. Defendant's and Soane's fingerprints were found on the television. Soane later admitted to taking the television and the blanket.

The People subsequently charged defendant with one count of second degree robbery (§ 211) and one count of assault with a deadly weapon (§ 245, subd. (a)(1)).⁴ The People further alleged defendant was twice previously convicted of serious felonies that also were strike offenses.

Trial Testimony

At trial, Soane testified that on November 9, 2014, he and defendant did drugs together. Defendant and Soane were driving to buy more drugs when a female friend

⁴ Soane was charged and tried as a codefendant but is not part of this appeal.

asked them to pick her up from the Days Inn Motel. They met her near one of the motel rooms. She had methamphetamine so the three of them were going to smoke it in another friend's room. They could not, however, get into the motel.

According to Soane's testimony, defendant looked into the nearest motel room and told the others no one was inside. Soane went into the room, ripped the television off the wall, covered it with a sheet, and walked out. Soane began to walk away and defendant, along with the female friend, followed him.

As the three of them walked to Soane's car, Soane saw defendant push a man that approached them. Soane handed the television to the female and approached defendant and Purohit; defendant pushed Soane away. Soane again started walking toward defendant's car while Purohit was yelling at them, so Soane turned back and tried to hit Purohit. Soane then ran to the car. He acknowledged defendant drove the car within about two feet of Purohit. Later, when they got to their sister's house, defendant yelled at Soane and the female friend to get out of the car.

Soane also testified that he asked his other brother to return the television and he turned himself in within two days. He did not remember being interviewed by Detective John Fan, but said it was true that defendant was not involved in the theft.

Following trial, the jury found defendant guilty of second degree robbery (§ 211) and the lesser included offense of misdemeanor assault (§ 240). Defendant admitted as true the allegations that he was previously convicted of two serious felonies that also were strike offenses.

Defendant's Romero Motion⁵

Defendant subsequently moved the trial court to strike one of his prior strike convictions in the interests of justice. In support of his motion to strike a prior strike, defendant argued his prior convictions were remote, having occurred “approximately 12 and 11 years” earlier. He argued the force or fear used to steal the television in the current offense was “minimal,” that it was only a “strong-arm taking of a TV set versus other robberies that occur daily” He also argued that even if the court were to strike one of his prior strike convictions, the trial court still could sentence defendant to 20 years in state prison. This, defendant claimed, would “more than adequately punish [him] not only for his current second degree robbery conviction, but also for his prior conduct.” Defendant submitted numerous letters supporting him.

The court acknowledged its discretion in a *Romero* hearing and that it must consider “defendant’s background, nature of his present offense, and any other individual considerations.” The court noted defendant exercised his right to a jury trial and was “completely polite and courteous during the trial.” The court remembered testimony that on the day the crimes were committed, defendant and his brother were “doing a fairly good amount of controlled substances immediately prior to leaving the house.”

Relative to the current crime, the court found defendant “showed disrespect and disregard to the rights of the victim in the case by his attitude and responses to that person.” The court also found that, while the physical contact was not “the most violent,” there was physical contact and “defendant knowingly and voluntarily participated in all of that.” Further, the court found defendant could have avoided driving his car toward Purohit but chose not to.

⁵ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

The court also found that, at 38 years old, defendant “is not terribly young,” with a significant criminal history. Defendant committed his first misdemeanor in 1993, as a juvenile. The following year, he was continued as a ward of the state after committing a felony. In 1995, there was another juvenile adjudication of a felony and another misdemeanor in 1996. In 2001, defendant was convicted of his first misdemeanor as an adult and in 2003 was convicted of a felony for which he was sentenced to two years in state prison.

Defendant was convicted of another felony in 2004, for which he was sentenced to seven years in state prison. Defendant was released in 2009 and in 2011 was convicted of another felony, for which he was sentenced to four years in state prison. He was released from prison two months before committing the current offense. In sum, the court observed, this was defendant’s sixth felony conviction with a “de minimis amount of time out of custody” before committing the next offense. Defendant regularly violated his parole or probation and was on parole at the time he committed these offenses.

The court found defendant “demonstrated he’s been a life-long failure of adjustments to probation or parole.” The court also found defendant had completely failed to benefit from attempts to rehabilitate and “demonstrated that he has absolutely no potential for rehabilitation whatsoever.” The court agreed defendant had a significant support system, but concluded that support system was always there but never stopped defendant from committing criminal offenses. The court was particularly concerned that in 2004 defendant was barred from possessing a firearm and then was convicted of possessing a firearm in 2011, all the while having this significant support system. This, the court declared, “demonstrates a completely wanton disregard for the laws and public safety and I see nothing in his character which has changed since then.”

This, the court said, was not defendant’s second chance, or even his third or fourth chance; this was defendant’s seventh chance and defendant has “demonstrated through

his entire life that every time he's given a chance he takes advantage of that to commit criminal misconduct."

In sum, the court ruled, the defendant's 2003 and 2004 strike convictions are remote, but defendant has "been continually incarcerated and or committing additional crimes since that period of time." Defendant "has virtually no potential for rehabilitation based upon his demonstrated conduct." The immediate crime included "actual or threatened violence." It was not "the most significant threatened violence," but defendant "drove the vehicle in the immediate vicinity of the hotel manager." And, the court found there were no mitigating factors "other than those presented in the letters of the people, all of which [the court] considered."

"Based upon all of those factors, I find that [defendant] is exactly the kind of person that the three strikes is designed to address. And he's completely within the heartland of the Three Strikes law. And it would be an abuse of my discretion to grant his motion to strike one of his strikes. [¶] Accordingly, his motion to strike one of the strikes is denied."

Before sentencing defendant, the court invited counsel to address the court:
"[Counsel], I'm happy to hear you with regard to sentencing.

"[DEFENSE COUNSEL]: Obviously, I'm—if the court is not striking . . . either of his priors, I'm not sure what discretion the court has to impose anything but—you can't strike the two five-year priors.

"THE COURT: I don't think I do. But I certainly want to give you an opportunity to be heard and perhaps tell me why I might be mistaken in th[at] regard.

"[DEFENSE COUNSEL]: I would indicate for the record that I'm unaware of any law that allows the court to strike the two five-year priors or once the court has to strike priors not to impose 25-to-life.

“THE COURT: All right. Thank you.

“[DEFENSE COUNSEL]: I may be erroneous. If I am, the appellate court will tell me.

“THE COURT: I think you’re correct. But I did want to give you an opportunity to be heard, and make known anything that you wanted to make known.”

The court then denied defendant probation and sentenced him to an aggregate term of 35 years to life: 25 years to life for second degree robbery and an additional five years each for his prior serious felony convictions.

DISCUSSION

1.0 *Romero* Motion

Defendant moved the trial court to strike one of his prior convictions pursuant to section 1385, based on his claims that the prior strikes were remote, the current criminal offense was only minimally violent, and he had a vast support system of people who believed in him and could help him do better. On appeal, he contends the trial court abused its discretion in denying his motion, and thus imposition of a 35-year-to-life sentence was excessive. We disagree.

Trial courts may dismiss a prior strike when a court finds a defendant falls outside the spirit of the Three Strikes law. (§ 1385; *Romero, supra*, 13 Cal.4th at pp. 529-530.) In choosing whether to exercise this discretion, the court must determine whether “ ‘in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.’ ” (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) We review the trial court’s decision whether to strike a prior felony conviction for abuse

of discretion, meaning we will not reverse that decision “unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at pp. 375, 377.) Here, the trial court carefully considered defendant’s argument and the record and weighed each of the factors relevant to the exercise of its discretion in methodical detail. In so doing, the trial court found defendant was “exactly the kind of person” the Three Strikes law was designed to address. That finding is supported by the record.

Defendant’s criminal history extends all the way back to 1993. He has now been convicted of six felonies and five misdemeanors, committing many of those crimes while on probation or parole. Defendant already has served numerous years in state prison and continues to commit crimes undeterred. As noted by the trial court, defendant has been given multiple opportunities to rehabilitate himself, and at each of those opportunities, he had a substantial support system. Despite that support system, defendant has refused to rehabilitate and continues to show a complete disregard for the law. Accordingly, on this record, we find no abuse of discretion.

2.0 *Batson/ Wheeler*⁶ Motions

Defendant, who is Pacific Islander, contends the prosecutor exercised racially discriminatory peremptory challenges against two African-American prospective jurors in violation of *Batson*, *supra*, 476 U.S. 79 and *Wheeler*, *supra*, 22 Cal.3d 258, and the trial court erred in concluding the prosecutor’s race-neutral explanations were credible.

2.1 *Background*

After seating a jury of 12, the trial court and counsel began the process of selecting three alternate jurors. The People then issued a peremptory challenge and asked to excuse Prospective Juror No. 13. Codefendant Soane made a motion under

⁶ *Batson v. Kentucky* (1986) 476 U.S. 79 [90 L.Ed.2d 69] (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

Batson/Wheeler that the People's peremptory challenge was racially motivated because Prospective Juror No. 13 was African-American. Defendant joined in that motion.

In support of the motion, defense counsel argued that by excluding Prospective Juror No. 13, the prosecutor established a pattern of excluding potential jurors who were African-American. Defense counsel noted the prosecutor previously excluded Prospective Juror No. 11 (who was potentially African-American) and Prospective Juror No. 6 during the selection of the first 12 jurors. The court noted that Prospective Juror No. 13 was the prosecutor's tenth peremptory challenge; defendants' counsel had not challenged any of the prior peremptory challenges that resulted in the excusal of two African-Americans from the jury. The court also noted, and the parties agreed, that one of the 12 seated jurors was African-American.

The prosecutor offered race-neutral reasons for excusing Prospective Juror No. 6, Prospective Juror No. 11, and now Prospective Juror No. 13. He excused Prospective Juror No. 6 because her cousin was currently incarcerated in federal prison and she spoke to her cousin nearly every day. This, the prosecutor indicated, could make Prospective Juror No. 6 "unfairly sympathetic" to defendants in this case.

The prosecutor excused Prospective Juror No. 11 because he worked as an "adaptive skills trainer" with a "Big Brother" type social program. The prosecutor believed that type of work could make Prospective Juror No. 11 "more sensitive to the plight of other people." In addition, Prospective Juror No. 11 exchanged smiles with defendant Soane and was responsive to defense counsel's questioning while being "unresponsive" to the prosecutor's. Combined, these things led the prosecutor to believe Prospective Juror No. 11 would favor the defense.

Prospective Juror No. 13, the prosecutor explained, worked "in news and public affairs" and the prosecutor "almost always [excused] any type of journalist from the jury panel." It was the prosecutor's experience that journalists "tend to be very liberally

slanted” and “a liberal mindset is—weighs against the People.” In addition, the prosecutor added, he had an experience where a journalist was seated on the jury and was blogging his/her views throughout the trial. This created a “major issue.”

The court ruled as follows, “[I]t appears that three of the four possible—three out of the four African-Americans who were subject to challenge were, in fact, challenged by the People. I don’t find that that necessarily establishes a *prima facie* case, because there are reasons why the people who—two of the people who were challenged, the People have been able to articulate non-racially based, rational reasons why they were challenged.” The court thus found defendants failed to establish a *prima facie* case of discrimination. The court further ruled that were a *prima facie* case established, it “would have been overcome by the explanation as to why [the prosecutor] challenged [Prospective Juror No. 13] for non-racially [based] reasons.” Accordingly, the court denied defendants’ motion.

The prosecutor then moved to exclude Prospective Juror No. 14, who also appeared to be African-American. Defendants responded with another *Batson/Wheeler* motion. The prosecutor expressed surprise at the motion, noting they all had spoken to Prospective Juror No. 14 in private. Prospective Juror No. 14’s son served a three- to four-year sentence for carjacking. The conviction was 20 years ago but Prospective Juror No. 14 believed the decision to prosecute her then 16-year-old son as an adult was “unfair.” She was still upset about it and she said she was only 85 percent sure she could be fair in this case.

Prospective Juror No. 14 also described being pulled over in Texas and explained how upset she was about how that was “handled.” The prosecutor said he did not “delve into these things because it was so obvious to me that she would be prejudiced against my side of the case, and understandably so.” Finally, the prosecutor noted, Prospective Juror

No. 14 had yelled out during voir dire that morning and corrected him on something. She was correct but he found it “odd” that she would shout that out inside the courtroom.

The prosecutor noted he previously filed a motion to exclude Prospective Juror No. 14 for cause, which the trial court denied. The court remembered that motion and remembered finding Prospective Juror No. 14 was “reasonably close to where [she] should be to be qualified”; so denied the motion. That said, the court found the prosecutor was not precluded from using a peremptory challenge to excuse her. The court found Prospective Juror No. 14 was African-American but “based upon the information set forth, [the prosecutor] has articulated a racially neutral reason as to why he has challenged her.” The court thus denied defendants’ motion.

2.2 Analysis

The law applicable to *Batson/Wheeler* claims is well established: “First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.” (*People v. Lenix* (2008) 44 Cal.4th 602, 612-613 (*Lenix*); accord, *People v. Mills* (2010) 48 Cal.4th 158, 173-174.)

Here, the trial court ruled that even had defendant established a prima facie case showing the prosecutor exercised peremptory challenges based on race, the court found the prosecutor’s race-neutral explanations credible. Thus, in this case, only the third step is at issue. “At the third stage of the *Wheeler/Batson* inquiry, ‘the issue comes down to whether the trial court finds the prosecutor’s race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor’s demeanor; by how

reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.’ [Citation.] [Fn. omitted.] In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court’s own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her.” (*Lenix, supra*, 44 Cal.4th at p. 613.)

We review the trial court’s determinations for substantial evidence. (*Lenix, supra*, 44 Cal.4th at p. 613; see *Foster v. Chatman* (2016) 578 U.S. ___, ___ [195 L.Ed.2d 1, 12-13] [explaining the third step “turns on factual determinations, and, ‘in the absence of exceptional circumstances,’ we defer to state court factual findings unless we conclude that they are clearly erroneous”].) “We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court’s ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal.” (*People v. Burgener* (2003) 29 Cal.4th 833, 864.)

Substantial evidence supports the trial court’s denial of defendant’s *Batson/Wheeler* motions. It shows the prosecutor excused the two prospective jurors and two prospective alternate jurors at issue for genuine reasons unrelated to race. Prospective Juror No. 13 was a reporter and, in the prosecutor’s experience, reporters have a liberal mindset, and a liberal mindset generally weighed in favor of defendants. In addition, the prosecutor had a specific issue with a reporter blogging his/her opinions about a trial during the trial. It was, therefore, the prosecutor’s general practice to excuse all reporters from the jury pool.

Prospective Juror No. 14 was dissatisfied with the criminal justice system. Her 16-year-old son had been prosecuted as an adult, a decision that continued to upset her 20

years later. She also had a run-in with law enforcement in Texas, a situation she did not believe was handled appropriately. Prospective Juror No. 14 even indicated she was only 85 percent sure she could be fair judging the facts of this trial.

Prospective Juror No. 6 had a cousin in federal prison to whom she spoke on a regular basis. The prosecutor believed Prospective Juror No. 6's close relationship with her incarcerated cousin may cause her to favor the defense.

Prospective Juror No. 11 worked in a "Big Brother" type program. The prosecutor believed the nature of this work may influence Prospective Juror No. 11's ability to fairly assess the defense. The prosecutor's belief was buttressed by what he determined was Prospective Juror No. 11's connecting to defendant Soane and defense counsel, while being "unresponsive" to the People.

All of these reasons are inherently plausible and are supported by the record.

Defendant nevertheless claims the prosecutor's stated reasons are discriminatory based on comparative juror analysis. He indicates that "a number of the jurors were nurses or students who arguably would be every bit as 'sympathetic' as would be a journalist or a person who works with the disabled."

" '[E]vidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by the defendant and the record is adequate to permit the urged comparisons.' (*People v. Lenix* (2008) 44 Cal.4th 602, 622.) ' "The rationale for comparative juror analysis is that a side-by-side comparison of a prospective juror struck by the prosecutor with a prospective juror accepted by the prosecutor may provide relevant circumstantial evidence of purposeful discrimination by the prosecutor. [Citations.]' [Citation.] "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at

Batson’s third step.” [Citation.] “At the same time, ‘we are mindful that comparative juror analysis on a cold appellate record has inherent limitations.’ [Citation.] In addition to the difficulty of assessing tone, expression and gesture from the written transcript of voir dire, we attempt to keep in mind the fluid character of the jury selection process and the complexity of the balance involved.” ’ (*People v. Winbush* (2017) 2 Cal.5th 402, 442.)” (*People v. Woodruff* (2018) 5 Cal.5th 697, 754.)

Defendant does not, however, make a “side-by-side comparison of a prospective juror struck by the prosecutor with a prospective juror accepted by the prosecutor” (*People v. DeHoyos* (2013) 57 Cal.4th 79, 109.) Rather, similar to his argument in the trial court, defendant simply says that nurses and students are “arguably” as sympathetic to defendants as “a journalist or a person who works with the disabled.” Therefore, defendant argues, the subjective reasons articulated by the prosecution are not race-neutral. This broad-brush argument, made here and in the trial court, without reference to any specific juror accepted by the prosecution results in a record that does not allow us to perform the required, careful exploration of alleged similarities between jurors in order to determine whether the jurors in question are or are not “really comparable.” (*Snyder v. Louisiana* (2008) 552 U.S. 472, 483 [170 L.Ed.2d 175]; see *People v. Winbush, supra*, 2 Cal.5th at p. 443 [jurors “ ‘must be materially similar in the respects significant to the prosecutor’s stated basis for the challenge’ ”].)

Furthermore, comparative juror analysis is not dispositive; it is only one form of circumstantial evidence relevant to determining intentional discrimination. (*Lenix, supra*, 44 Cal.4th at p. 622.) Here, the record contains additional circumstantial evidence that the prosecutor was not acting to intentionally exclude African-Americans from the jury based on their race. In addition to the prosecutor’s reasonable explanations for excluding Prospective Juror No. 14, Prospective Juror No. 11, and Prospective Juror No. 6, there

was an African-American woman accepted by the prosecutor and seated in the jury. We are thus not persuaded by defendant's argument.

We uphold the trial court's denial of defendant's *Batson/Wheeler* motions.

3.0 Senate Bill No. 1393

On September 30, 2018, the Governor signed into law Senate Bill No. 1393 (2017-2018 Reg. Sess.) (hereafter Senate Bill 1393), which amended sections 667, subdivision (a)(1) and 1385, effective January 1, 2019 (Stats. 2018, ch. 1013, §§ 1, 2). Prior to the enactment of Senate Bill 1393, and at the time defendant was sentenced by the trial court, the trial court had no discretion to strike a five-year felony enhancement under section 667, subdivision (a)(1) because such enhancements were to be imposed “[i]n compliance with subdivision (b) of Section 1385.” (Former § 667, subd. (a)(1).) Section 1385, subdivision (b) said: “This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.” (Former § 1385, subd. (b).)

Senate Bill 1393 deleted the reference to section 1385, subdivision (b) in section 667, subdivision (a)(1) and deleted the language that was formerly section 1385, subdivision (b). (See Stats. 2018, ch. 1013, §§ 1, 2; see also §§ 667, subd. (a)(1), 1385.) As a result of these amendments, trial courts now have the discretion to strike a five-year felony prior. (See Legis. Counsel's Dig., Sen. Bill 1393 (2017-2018 Reg. Sess.); §§ 667, subd. (a)(1), 1385.)

In his supplemental brief, defendant contends under Senate Bill 1393 we must remand the matter to the trial court to allow it to exercise its discretion to strike the five-year felony enhancements. The People concede the amendments effectuated by Senate Bill 1393 apply retroactively, but contend remand is not appropriate in this case, because remand would be futile.

We agree with the parties that Senate Bill 1393 applies retroactively. (See *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091 [Sen. Bill No. 620 amendments provide discretion to impose a lesser sentence, nothing in amendment suggests Legislature intended amendments to apply prospectively only].) However, because the record does not contain a clear indication how the trial court would have exercised its discretion if it had been empowered to do so at the time of defendant's sentencing, we conclude remand is required. (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 427-428 [finding remand proper because the record was not clear on court's intent to impose the maximum term]; see also *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110-1111 [finding that "speculation about what a trial court might do on remand is not 'clearly indicated' by considering only the original sentence"].)

Here, at sentencing, the trial court and counsel acknowledged the court did not have discretion to strike the five-year felony enhancements. The court nevertheless gave counsel a full opportunity to argue why it should strike those enhancements. Here, the court did not clearly indicate it would decline to strike one or both of the alleged five-year felony enhancements if it had the discretion to do so. The court now has the discretion to do so. Thus, we will remand the matter to allow the trial court to exercise its newly granted discretion. We express no opinion as to how the trial court should exercise its discretion.

DISPOSITION

The sentence is vacated and the matter is remanded for the limited purpose of allowing the trial court to consider whether one or both of the five-year felony

enhancements under Penal Code section 667, subdivision (a)(1) should be stricken pursuant to Senate Bill 1393. In all other respects, the judgment is affirmed.

BUTZ, Acting P. J.

We concur:

DUARTE, J.

HOCH, J.